

INTRODUCTION

1. This appeal involves the entitlement of Eggstream Farms Ltd. (“Eggstream”) to Temporary Restricted Licence Quota (“TRLQ”) to produce free-range organic eggs. This Decision is being issued with Reasons for Decision to follow.
2. Eggstream initially filed an appeal on March 21, 2001, of a British Columbia Egg Marketing Board (the “Egg Board”) decision to deny additional TRLQ to Eggstream for the purposes of free-range organic production.
3. This appeal was resolved through negotiation whereby the Egg Board agreed to allocate an additional 1237 birds of TRLQ to Eggstream. Eggstream formally withdrew its appeal. Despite reaching a settlement the Egg Board and Eggstream have been unable to agree on the terms of allocation and as such, Eggstream sought to “renew” its first appeal.
4. By decision dated October 31, 2001, the British Columbia Marketing Board (“BCMB”) determined that once withdrawn, there was no jurisdiction to renew or revive an appeal. If an issue has arisen on implementing a settlement agreement, Eggstream’s remedy was to file a new appeal.
5. On November 1, 2001, Eggstream filed a new appeal alleging a breach of the earlier settlement agreement by the Egg Board and requesting an expedited hearing of its appeal.
6. The appeal was heard by way of telephone conference on November 13, 2001.

ISSUES

7. Should additional TRLQ be issued to the Appellant, Eggstream?
8. The Appellant has identified the following grounds of appeal:
 - a) that the Egg Board has frustrated the April 2001 facilitated agreement to provide additional TRLQ to the Appellant;
 - b) that the Egg Board frustrated the Appellant’s attempts to purchase other quota from Rovon Poultry Farm (1985) Ltd. (“Rovon”); and
 - c) that the setting aside of TRLQ allocation for the Certified Organic Associations of British Columbia was unfair to other organic producers such as the Appellant.

REMEDIES SOUGHT

9. That 5000 new TRLQ for organic production be issued to Darren Jansen effective November 1, 2001, under the current terms and conditions of the Revised TRLQ Program.
10. That the 3763 TRLQ currently held by the Appellant remain in place until such time as quota is purchased to replace this TRLQ.
11. That the claw back provision of the Revised TRLQ Program not apply to the 3763 TRLQ pending its return to the Egg Board after the Appellant purchases quota.
12. That the restriction on the maximum level (5000 birds) of TRLQ that can be issued not be applied to the collective holdings of the Appellant and Darren Jansen.

FINDINGS

13. The Panel finds that the Egg Board was correct in amending its TRLQ Permit contract to include the terms required as a result of the BCMB's 2000 Egg Quota Allocation Review. However, in incorporating the new terms in the 2001 contract it appears that the Egg Board considered the date TRLQ Permit was first issued in order to calculate the 7-year term. Given that TRLQ was not initially issued on any term but instead was subject to annual renewal, it would be more appropriate to set the 7-year term from 2001 forward, as it was not contemplated until the review of the program in 2000 when or how TRLQ would return to the Egg Board. Producers operating under the one year renewable term with the old TRLQ program should have the same benefit of stable business planning over a longer fixed term as is now afforded to new Permit holders.
14. In considering the issue of the claw back or surrender provision, the further issue of the bona fide attempts on the part of a producer to purchase quota arises. In this appeal, the Panel heard evidence of the Appellant's attempts to acquire quota. Although a prospective transferor (Rovon) was found, the Egg Board did not properly solicit the prior approval of the BCMB to vary its regional quota transfer policy. This quota was ultimately lost to another province. This is a failure on the part of the Egg Board, as well as the BC regulated marketing system in general, to respond effectively in this specific situation. The Appellant was prepared to make a significant investment to acquire quota and use it for organic production. He had a reasonable expectation of an appropriate response from the system. Instead, he now faces a significant economic disadvantage.
15. The exceptional circumstances surrounding this particular quota transfer aside, the Panel is of the view that before the claw back or surrender provision can operate to decrease any producer's TRLQ Permit, there must have been real opportunities for that producer to purchase quota. However, where a producer fails to make bona fide efforts to purchase quota, the claw back or surrender provision would remain operative.

16. Finally, the Panel finds that the issue of an additional allocation for 5000 birds of TRLQ for organic production, on the grounds identified by the Appellant, is not properly before us in this appeal. While this issue was raised in the first appeal, the Appellant chose to settle that appeal on being offered an additional 1237 birds of TRLQ. It is this settlement which the Appellant alleges that the Egg Board breached and it is from this settlement that the Appellant appeals. The Panel is not prepared to go behind the settlement and revisit the old issues that formed part of the initial appeal.

ORDERS

17. The Appellant's original allocation of 3763 birds of TRLQ is confirmed. This allocation is subject to the terms of the 7-year Revised TRLQ Program commencing November 19, 2001 with a claw back or surrender provision commencing the beginning of year 5, 2005.
18. The Appellant is allocated an additional 1237 birds of TRLQ Permit. This Permit is also subject to the terms of the Revised TRLQ Program. The Permit is subject to a 7-year term commencing April 29, 2001 and a claw back or surrender provision commencing the beginning of year 5, 2005.
19. The Appellant's request for a further allocation of 5000 birds of TRLQ for organic production is denied.
20. In view of the unique circumstances involved in the frustrated transfer of quota from Rovon to the Appellant, the Egg Board is directed to issue, effective November 19, 2001, sufficient quota, permit and/or credits to Eggstream to cover the balance of the flock coming into production as of that date. This allocation, the type of which is to be determined by the Egg Board, will be for the production life of this flock only and subject to any appropriate fees and levies that the Egg Board would normally impose. Any quota acquired by the Appellant during this period will be applied to this temporary allocation and any amount of the allocation replaced by acquired quota is to be returned to the Egg Board forthwith.
21. There will be no order as to costs.
22. Reasons for Decision to follow.

COMMENTS

23. The short-term relief provided to the Appellant at paragraph 20 comes solely as a result of the unique and unfortunate consequences of the frustrated transfer of quota from Rovon. The Appellant's organic production requirements in and of themselves were not determinative of this appeal. Those requirements, which must be addressed in the context of overall industry needs, should be the subject of ongoing discussion and longer term planning between the Appellant and the Egg Board.

Dated at Victoria, British Columbia this 19th day of November, 2001.

BRITISH COLUMBIA MARKETING BOARD

Per

(Original signed by):

Christine J. Elsaesser, Vice Chair

Karen Webster, Member

Hamish Bruce, Member